No. 85-1433

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GLORIA RICHARDSON, Warden,
Petitioner,

v.

CLARISSA MARSH,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF FOR RESPONDENT

STATE APPELLATE DEFENDER OFFICE
R. STEVEN WHALEN
(Appointed by this Court)
Special Assistant Defender
1200 Sixth Avenue
Third Floor, North Tower
Detroit, Michigan 48226
(313) 256-2814
Counsel for Respondent

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether Respondent was denied her Sixth Amendment right of confrontation where a codefendant's extrajudicial statement, even as redacted, added substantial, perhaps critical weight to the prosecutor's case both standing alone and when viewed in the context of other evidence, including the Respondent's own exculpatory testimony, and where respondent was unable to cross-examine her codefendant.

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COUNTER-STATEMENT OF THE CASE

Respondent Clarissa Marsh was convicted by a jury in the Recorder's Court for the City of Detroit of two counts of felony murder, M.C.L. 750.316; M.S.A. 28.548 and one count of assault with intent to commit murder, M.C.L. 750.83; M.S.A. 28.278. She was sentenced to mandatory life imprisonment on the two murder counts and 60 to 90 years on the assault conviction.

Respondent was tried jointly with Benjamin Williams. Prior to trial, the Judge denied her motion for severance (R. 20).

The charges arose out of an incident on October 29, 1978 at the home of Ollie Scott, which culminated in the shooting deaths of Ms. Scott and Koran Knighton and serious injury to Cynthia Knighton, Koran's mother.

The chief witness for the prosecution was Cynthia Knighton. She testified that on October 29, 1978, she was at the home of her aunt, Ollie Scott, with her young son Koran (J.A. 25-26). She stated that she had taken Koran to the bathroom upstairs, and when she came back down, she saw a man and a woman talking to her aunt. She identified the Respondent as the woman (J.A. 28-30). According to Ms. Knighton, Respondent stated she had come to "pick something up" (J.A. 33).

Knighton testified that after a period of conversation, the man pulled a gun and stated that Ollie Scott knew something about someone who had gotten killed (J.A. 34-35).

According to Knighton, Respondent stood up and walked to the front door (J.A. 37). She did not have a weapon or anything else in her hands (R. 216).

Eventually the doorbell rang, and the man with the gun asked Scott who was at the door. The Respondent opened

the door, and a man who Knighton identified as Benjamin Williams entered holding a gun. Ms. Knighton recalled Williams saying, "I'm so-and-so's brother," and "Where's the money?" (J.A. 40-43).

The first man (who had first been in the house with Respondent) then took Ollie Scott upstairs. Respondent was still by the front door at this time, and Williams went into the next room (J.A. 46-47). At that point Ms. Knighton ran towards the front door with her son (T 169). Knighton stated that Respondent "grabbed" her, and Williams came in from the next room. Respondent did not shout out or say anything during this incident, but Williams told Knighton to lay down on the floor (J.A. 47-48).

Williams then went upstairs, and Knighton testified that she heard what she believed were drawers opening and closing (J.A. 53).

When Scott, Williams, and the other man came back downstairs, the other man handed a grocery bag to Respondent (J.A. 54).

At that point both men still had guns (J.A. 56). The first man took Ollie Scott into the basement (J.A. 57). Respondent was still by the front door at this time (J.A. 58). Williams then told Ms. Knighton and her son to go into the basement (J.A. 59). Knighton testified that once she left the living room, she never saw the Respondent again, and she did not know whether Respondent was even in the house when everyone else went into the basement (R. 229-230).

Knighton testified that when she entered the basement, Ollie Scott was lying on the floor, and the other man was unrolling a blanket (J.A. 61-62). Williams said, "Hurry up and tie them up," and the other man replied,

"We'll have to hurt them" (J.A. 65-66). Ms. Knighton stated that she then heard two shots coming from the small room in the basement where her aunt and the other man were (J.A. 70). Then, the other man approached her, held a blanket in front of her, and shot her three times (J.A. 72-74). After she was shot, Ms. Knighton heard what she described as "two little pings" (J.A. 76).

Knighton testified that after a few minutes she opened her eyes and saw that the men were gone (J.A. 77). She also saw her aunt and her son laying on the basement floor. She went upstairs and called the police (J.A. 78-79).

Clarissa Marsh's jointly tried co-defendant, Benjamin William, was alleged to have made a statement to the police after his arrest. Williams challenged the admission of the statement, but following a hearing, the judge ruled that he made the statement voluntarily (R. 149-150).

Respondent Marsh objected to the statement under *Bruton* v. *United States*, 391 U.S. 123; 20 L.Ed.2d 476; 88 S.Ct. 1620 (1968), contending that although it incriminated her, she would be unable to cross-examine Williams (J.A. 90-92). Respondent also renewed her motion for severance (J.A. 100-101).

The trial judge denied the motion for severance and ruled that Williams' statement could be admitted with deletions of Respondent Marsh's name (J.A. 107). Although the deletions were agreed upon by the prosecutor and defense counsel, both the judge and defense counsel made it clear that for purposes of appeal, Respondent's objection to the admission of any portion of the statement remained (J.A. 100; 107-108).

Detroit Police Officer Daniel McCarty read the edited version of Williams' statement to the jury. According to that statement, Williams received a telephone call from

Kareem Martin on the evening of October 29, 1978. Martin asked if he wanted to "go on a robbery" with him. About 15 to 20 minutes later, Martin picked him up in a black Monte Carlo car. Martin told him that they were going to rob a numbers house, and they would have to "take them out" after the robbery. Martin had a big silver gun, and he gave Williams a long-barrelled .22 revolver. According to the statement, they planned out the details of the robbery. Williams allegedly stated that after they got the money, Martin took the two ladies and the boy into the basement and he (Williams) went out to the car. After a few minutes, the statement said, Martin came to the car and remarked that he thought the girl was still alive, but he didn't have any more bullets. He allegedly asked Williams why he didn't go into the basement, and Williams replied that he "wasn't doing no shit like that." Martin then dropped Williams off in Highland Park (J.A. 119-123).

The trial judge instructed the jury that the statement could not be used as evidence against Respondent Marsh (J.A. 126-127). Williams did not take the stand.

Respondent testified in her own behalf. She stated that she was divorced and had two sons, aged 5 and 7, who were living in Ohio with her mother (J.A. 142-143). She met Kareem Martin in November of 1977, and by December they were "going together." She testified that in May or June of 1978 she was surprised to learn that Martin had a drug problem (J.A. 144-146).

Respondent stated that from that point on, Martin became overbearing with her (J.A. 151). Where he had previously shown interest in her children, he now became stricter (J.A. 152). She asked him to leave a number of times, but he stayed around (J.A. 153-154). He wouldn't

let her use her own car, a black Monte Carlo, and he physically abused her (J.A. 154-155). On numerous occasions, Martin forced her to borrow money from her friends and family in order to support his drug habit. (J.A. 148-149; 157-159).

Respondent testified that she became very depresserd with her situation, and on June 18, 1978, she was hospitalized following an attempted suicide (J.A. 156). She stated that in October of 1978, she attempted suicide again by taking 40 or 50 valium pills (J.A. 162-163).

Respondent testified that on October 29, 1978, she went to the Eastland Shopping Center with Martin and her children (J.A. 163-164). While she was there, she lost her wallet, which contained money with which Martin had planned to purchase drugs (J.A. 164). Martin became very upset and told her to borrow more money (J.A. 165, 168). When she was unsuccessful in borrowing money, Martin told her to try to get the money from Ollie Scott (J.A. 168-169). Respondent had worked with Scott, and had borrowed about $100 from her previously in the summer of 1978 (J.A. 161). Martin insisted on accompanying her to Scott's house (J.A. 169).

After dropping her children off at a Halloween party, Respondent and Martin picked up a friend of Martin (J.A. 170). She later identified this friend as Benjamin Williams (J.A. 272). Respondent stated that during the drive to Scott's house, she heard no conversation about a robbery (J.A. 170-171), and she didn't know that Martin or anyone else was armed (J.A. 196).

Respondent testified that she and Martin entered Ollie Scott's house, and she asked Scott about borrowing some money (J.A. 171-172). She stated that after a period of conversation, Martin pulled a gun (J.A. 175). Respondent

got up and walked to the door, but testified that she did not feel free to leave at that time (J.A. 176-177). She heard the doorbell and saw that it was Martin's friend whom they had picked up (J.A. 177).

Respondent testified that she didn't try to leave the house because she was afraid. She stated that she did not leave the area by the front door (J.A. 178-179).

Respondent stated that Martin took Ollie Scott upstairs, and Williams followed, but that they came right back down (J.A. 178). At one point Cynthia Knighton jumped up and ran for the door where Respondent was standing. Respondent testified that she was startled and put her hands out (J.A. 180-182). She stated that she may have grabbed Ms. Knighton (J.A. 182). In any event, Williams came in from the next room and told Ms. Knighton and her son to sit on the floor (J.A. 183).

Respondent testified that when Martin came back downstairs, he handed her a bag, which she placed on the floor (J.A. 185). Then, Martin took Ollie Scott toward the basement, and Williams told Ms. Knighton and her son to go to the basement (J.A. 186-187). Respondent stated that she never heard anyone say anything about being hurt, shot, or killed (J.A. 186).

After everyone else went to the basement, Respondent grabbed her purse and left the house (J.A. 187). She stated that she picked up her children and drove around for a long time (J.A. 188). She then telephoned her brother, who met her at a motel and registered her in a room (J.A. 190). Her children went with her brother (J.A. 191). The next morning Respondent heard on the news that a murder had occurred at Ollie Scott's house (J.A. 192).

Respondent stated that she called Martin's sister, who arranged a meeting with Jonathan Walker, trial counsel in this case. That evening, accompanied by Mr. Walker, she voluntarily turned herself in to the police (J.A. 192-195).

Respondent testified that she had no intention of robbing or killing anyone when she went to Ollie Scott's house (J.A. 196).

The prosecutor's theory of the case was that both Respondent and Williams aided and abetted Martin in the perpetration of robbery and murder (J.A. 303-304; 319-320). In regard to Williams, he told the jury that the statement made to the police showed the intent to commit a robbery (J.A. 309-310). The prosecutor also told the jury that Williams "knew before he even got over to the home on Mendota that there was going to be a killing. Kareem said that he would have to take them out after the robbery" (J.A. 311-312). Also, the prosecutor stated that Respondent Marsh was in on the planning stages of the robbery (J.A. 339).

Respondent's theory was that the prosecutor did not show her guilt beyond a reasonable doubt and that her very presence on the night in question was a product of duress (J.A. 355-356; 417-418).

SUMMARY OF ARGUMENT

In the context of a joint trial, a defendant is denied the Sixth Amendment right of confrontation when he or she is incriminated by the extrajudicial admission of a nontestifying codefendant. Under these circumstances, *Bruton* v. *United States*, 391 U.S. 123; 20 L.Ed.2d 476; 88 S.Ct. 1620 (1968), holds that cautionary instructions to the jury are inadequate to protect the defendant's rights under the Confrontation Clause, because of the elevated

risk that the jury will erroneously use the hearsay against the defendant and the great harm to the defendant if it does.

Given that the overriding concern of the Confrontation Clause is to ensure the reliability of the truth-finding process, *Bruton* is not limited to cases where the accomplice's statement only names or incriminates a defendant on its face. If an otherwise innocuous statement becomes strongly inculpatory when viewed in the context of other, admissible evidence, then there is an equal risk that the jury will misuse the statement against the defendant despite instructions to the contrary, especially in cases woven from circumstantial evidence.

The correct analysis of a *Bruton* problem looks at the strength of inculpatory inference engendered by the codefendant's statement, not whether its source was direct or circumstantial. If the challenged evidence, either on its face or in the context of other evidence, adds substantial weight to the prosecutor's case in a form not subject to cross-examination, and if there are no other factors which would rebut the strong presumption of unreliability which inheres in an accomplice's confession, then *Bruton* has been violated. The only remaining question becomes whether the error is harmless beyond a reasonable doubt.

An approach which does not look beyond the four corners of the accomplice's statement will, in a case such as the one before this Court, ignore the true incriminatory nature of the evidence and pose a serious threat to the reliability of the verdict.

ARGUMENT

I. RESPONDENT WAS DENIED HER SIXTH AMENDMENT RIGHT OF CONFRONTATION WHERE A CODEFENDANT'S EXTRAJUDICIAL STATEMENT, EVEN AS REDACTED, ADDED SUBSTANTIAL, PERHAPS CRITICAL WEIGHT TO THE PROSECUTOR'S CASE BOTH STANDING ALONE AND WHEN VIEWED IN THE CONTEXT OF OTHER EVIDENCE, INCLUDING THE RESPONDENT'S OWN EXCULPATORY TESTIMONY, AND WHERE RESPONDENT WAS UNABLE TO CROSS-EXAMINE HER CODEFENDANT.

A. Factual Background.

Respondent **Clarissa Marsh** was tried jointly with a codefendant, Benjamin Williams. Both were charged and tried under an aiding and abetting theory; the principal defendant, Kareem Martin had not been apprehended at the time of Respondent's trial.[1] Prior to trial, the judge denied Respondent's motion for severance (R. 20).

Both defendants were alleged to have participated in a robbery at the home of Ollie Scott, which culminated in the shooting deaths of two people and serious injury to a third. The jury convicted Respondent of two counts of felony murder and one count of assault with intent to murder.

Williams made a statement to the police after his arrest. He challenged the admission of his statement, but following an evidentiary hearing, the judge ruled that it was voluntarily given (R. 149-150).

Respondent objected to the admission of Williams' statement under *Bruton* v. *United States*, 391 U.S. 123; 20 L.Ed.2d 476; 88 S.Ct. 1620 (1968), arguing that

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[1] Martin was subsequently tried and convicted in 1985.

although it strongly incriminated her, she would be unable to cross-examine Williams (J.A. 90-92). She also renewed her motion for severance (J.A. 100-101).

The trial judge ruled that Williams' statement was admissible against him with deletions of Respondent Marsh's name (J.A. 107). Although trial counsel participated in the editing, both he and the judge made it clear that for purposes of appeal, Respondent's objection to the admission of any portion of Williams' statement remained (J.A. 100; 107-108). Counsel argued that, "[T]here are certain inferences that are raised by this statement even in its altered form that would tend to incriminate my client" (J.A. 91), and that "the statement even as altered and even with the curative instruction, still is the only evidence of certain elements of the crime, and therefore is not cumulative, and would be inadmissible" (J.A. 100).

Williams' original statement read as follows:

> "On Sunday evening, October 29, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said that he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay, and he said that he'd be by and pick me up. About 15 to 20 minutes later, Kareem and Clarissa, who I call 'KC', who is Kareem's girl friend, came by in his black Monte Carlo car. I got in the car and Kareem and Clarissa told me that we were going to stick up this crib where the lady knew them. Clarissa said that the place was a numbers house where she used to work and the lady knew her so there would be no trouble getting in because she owed her a hundred dollars and she would let them in. Kareem said that there would be over $5000 or 10,000 in the place. Kareem said that the [sic] would have to take them out after the rob-

bery because they knew them. Kareem had a big silver gun and he gave me a long barrel .22 caliber revolver. We then drove over to this house and parked the car across the street near the house. The plan was that I was supposed to wait outside until they got inside and then KC (Clarissa) was supposed to come out on the porch and let me know that Kareem had stuck the place up. Wait a minute, the plan was that I would wait in the car in front of the house until KC signaled me and the [sic] I would move the car down across the big street because they didn't want anyone to see the car. Okay Kareem and KC went up to the house and went inside. A couple of minutes later KC came out on the porch and waived. I moved the car and walked up to the house. I knocked on the door and KC opened the door. As I entered Kareem and this older lady were in the diningroom and this little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs and he had a pistol also. I stayed downstairs with the two people on the floor and KC. After Kareem took the lady upstairs, I went upstairs and the lady was laying the bed in the room to the left as you get up the stairs. The lady had already given KC two bags full of money before we had ever got upstairs and she had put them in her purse. Kareem, had thought that she had more money and that's why we went upstairs. Me and Kareem started searching the rooms but I didn't find any more money. Before Kareem took the lady upstairs, the lady was asking Clarissa, 'Why are you doing this to me?' Clarissa didn't answer her as I recall. I came downstairs and then Kareem came down with the lady. I said, 'Let's go, let's go'. Kareem said no. Kareem then took the two ladies and the little boy down the basement and that's when I left to go to the car. A couple of minutes later KC came to the car. She got behind the wheel and drove the car around the corner from the house and parked on the big street. A couple of minutes later, Kareem came to

the car and said he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't come down the basement and I said, 'I wasn't doing no shit like that'. They then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today and get my one-third share of the robbery after he had counted the money. That's all.

Signed, Benjamin Williams.

Completed 12:45 a.m., 10-31-78.

Sergeant Richard Davies.

Sergeant Daniel McCarty." (J.A. 102-107).

This was typed into the record outside the presence of the jury. After the jurors were brought back in, they heard the following edited version of Williams' statement:

"On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said he had been looking for me and James Coleman, who I call Tom. *He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes after Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house.* Kareem said there would be over $5000 or $10,000 in the place. *Kareem said that he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled .22 revolver.* We then drove over to this house and parked the car across the big street near the house. The plan was that I was would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside.

> A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the diningroom, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was lying the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we ever got upstairs. Kareem had thought that she had more money and that's why we went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, 'Let's go, let's go'. Kareem said no. Kareem then took the two ladies and the little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later, Kareem came to the car and said he thinks that the girl was still living because she was still moving and he didn't have any move [sic] bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, and get my share of the robbery after he had counted the money. That's all." (J.A. 119-123). (Emphasis added).

The trial judge then instructed the jury that the statement could not be used as evidence against Respondent Marsh (J.A. 126-127).

Williams chose not to testify; therefore, Respondent was unable to cross-examine him about his statement to the police.

Testifying in her own behalf, Respondent Marsh said that on the night in question, Martin, her boyfriend,

pressured her into going to Ollie Scott's house for the purpose of borrowing money (J.A. 168-169). Respondent owned a black Monte Carlo (J.A. 154). She testified that they picked up a friend of Martin before going to Scott's, and that after she and Martin were in Scott's house for awhile, Martin's friend rang the doorbell (J.A. 170; 177).

The Respondent said that in the car, she heard no talk of a robbery and saw no guns before they arrived at Scott's house (J.A. 170-171; 196).

Thus, while Respondent's testimony was exculpatory standing by itself, it placed her in the black Monte Carlo at the time Williams said that he and Martin discussed robbing and killing the people at the Scott house. That alleged discussion was the only direct evidence of a preconceived plan to rob and kill.

Following unsuccessful appeals in the Michigan courts, Respondent sought a writ of habeas corpus in the Federal District Court for the Eastern District of Michigan. Denying the writ, the District Judge held that *Bruton* v. *United States*, *supra*, does not apply if the inculpatory inference of a codefendant's hearsay statement is derived only in the context of other, admissible evidence, and that the admission of a statement which does not name or implicate a defendant on its face does not violate the Confrontation Clause of the Sixth Amendment.

The Sixth Circuit Court of Appeals reversed:

> "We reject the approach which limits the appraisal of the inculpatory value of an extrajudicial statement to the face of the statement itself. Such an approach ignores the true incriminatory effect of the statement, and, with no countervailing benefit, sanctions the use of the admittedly inadmissible evidence while ignoring the practical limitations inherent in the jury system as recognized by the Court in *Bruton*. Sanc-

> tioning the admission of an extrajudicial statement in circumstances in which a substantial risk exists that the statement will be used against the defendant not only denies the Sixth Amendment right to confrontation, but raises serious due process concerns regarding the validity of the conviction and the fundamental fairness of the trial process." *Marsh* v. *Richardson*, 781 F.2d 1201, 1212 (6th Cir. 1986).

This Court granted certiorari to determine this Sixth Amendment question upon which the Federal Circuit Courts appear to be divided.[2]

B. *Bruton* And The Right Of Confrontation.

In *Bruton* v. *United States*, *supra*, this Court held that the admission at a joint trial of a non-testifying accom-

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[2] The Second, Sixth, Seventh, and D.C. Circuits have all used an approach which assesses the incriminating effect of the hearsay in the context of other, admissible evidence. *United States* v. *Gonzales*, 555 F.2d 308 (2d Cir. 1977); *United States ex rel. La Belle* v. *Mancusi*, 404 F.2d 690 (2d Cir. 1968); *Marsh* v. *Richardson*, *supra*; *English* v. *United States*, 620 F.2d 150 (7th Cir. 1980); *United States* v. *Key*, 725 F.2d 1123 (7th Cir. 1984); *Serio* v. *United States*, 401 F.2d 989 (D.C. Cir. 1968).

The Fifth Circuit and the Eleventh Circuit have expressed a preference for a rule which does not look beyond the face of the codefendant's confession, but have cautioned that there may be circumstances where a facially non-inrciminating confession becomes strongly inculpatory in the context of extrinsic evidence. *Clark* v. *Maggio*, 737 F.2d 471, 478 (5th Cir. 1984); *United States* v. *Pendegraph*, 791 F.2d 1462, 1465 (11th Cir. 1986).

The Third and Ninth Circuits adhere to a *per se* rule that a reviewing court may not look beyond the face of the extrajudicial statement. *United States* v. *Belle*, 593 F.2d 487 (3d Cir. 1979); *United States* v. *Tavelman*, 650 F.2d 1133 (9th Cir. 1981). Although *Tavelman* cited *United States* v. *Belle*, *supra*, for support, it noted that "even if there was *Bruton* error, it was harmless beyond a reasonable doubt." 650 F.2d at 1139.

plice's statement which is powerfully incriminating as to the defendant violates the Sixth Amendment right of confrontation. *Bruton* further held that in this context, the risk that the jury would improperly use the declarant's statement against the defendant is so great, and the consequences to the defendant so vital if the jury does so, that cautionary instructions will not cure the prejudice:

> "Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpatory petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all." 391 U.S. at 137.

Bruton itself involved a situation where the accomplice's statement directly implicated the defendant by name. But that fact was not central to the *Bruton* rationale; rather, the case outlined in more general terms the facts which would bring the Confrontation Clause into play:

> "Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Con-

> frontation Clause was directed. Pointer v Texas, supra." 391 U.S. at 135-136. (Footnotes omitted).

Thus, the *Bruton* Court identified three factors which can combine to deny a defendant the right of confrontation: (1) the lack of opportunity to cross-examine, (2) the "powerfully incriminating" nature of the extrajudicial statement, and (3) the unreliability of the extrajudicial statement.

That *Bruton* is not limited to extrajudicial statements which directly name a defendant is best understood by viewing that case, and the three factors in particular, in the context of Sixth Amendment jurisprudence as developed by this Court over the last 21 years.

The preeminent goal of the Confrontation Clause is to guarantee the integrity of the truth-finding process. In *Pointer* v. *Texas*, 380 U.S. 400, 405; 13 L.Ed.2d 923; 85 S.Ct. 1065 (1965), Justice Black wrote:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

This Court has consistently viewed the Confrontation Clause as instrumental to the accurate determination of truth at criminal trials and hence to the reliability of verdicts. *Dutton* v. *Evans*, 400 U.S. 74, 89; 27 L.Ed.2d 213; 91 S.Ct. 210 (1970) ("The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials . . ."); *Parker* v. *Randolph*, 442 U.S. 62, 73; 60 L.Ed.2d 713; 99 S.Ct. 2132 (1979) ("The right of confrontation conferred by the Sixth

Amendment is a safeguard to ensure the fairness and accuracy of criminal trials"); *Lee* v. *Illinois*, 476 U.S. ___; 90 L.Ed.2d 525-526; 106 S.Ct. ___ (1986) ("The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials").

It is the convergence of the three factors identified in *Bruton* which obstructs this transcendent Sixth Amendment goal. A closer examination of each factor is therefore appropriate.

1. Denial Of Cross-Examination.

Cross-examination, as the adage goes, is "the greatest legal engine ever invented for the discovery of truth." *California* v. *Green*, 399 U.S. 149, 158; 26 L.Ed.2d 489; 90 S.Ct. 1930 (1970), quoting 5 Wigmore, § 1367. As this Court stated in *Pointer* v. *Texas*, *supra*, 380 U.S. at 404:

> "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."

Because the lack of an opportunity to cross-examine evidence affects the jury's ability to assess the truthfulness of that evidence, *Bruton* recognized this factor as a trigger for the Sixth Amendment where a nontestifying codefendant's statement is admitted at a joint trial.

2. The Powerfully Incriminating Nature Of The Statement.

It is this factor which is perhaps at the heart of the controversy in Respondent's case. Petitioner would

equate the phrase "powerfully incriminating" with "facially inculpatory," and exclude from Sixth Amendment coverage all other evidence, regardless of how strong a link it formed in the prosecutor's chain of proof or what potential effect it had on the jury's ability to accurately determine the truth. This approach effectively severs *Bruton* from the underlying Sixth Amendment values that case sought to protect.

Bruton was based in part on *Douglas* v. *Alabama*, 380 U.S. 415; 13 L.Ed.2d 934; 85 S.Ct. 1074 (1965), which had been decided three years earlier. In *Douglas*, this Court found a Sixth Amendment violation where the prosecutor, under the guise of cross-examining a separately tried and convicted accomplice who asserted the Fifth Amendment on the stand, read aloud that codefendant's confession at Douglas' jury trial. The confession incriminated Douglas, who was subsequently convicted. Writing for the Court, Justice Brennan characterized the codefendant's confession as follows:

> "The statements from the document as read by the Solicitor recited in considerable detail the circumstances leading to and surrounding the alleged crime; of crucial importance, they named the petitioner as the person who fired the shotgun blast which wounded the victim." 380 U.S. at 417.

Douglas thus identified two kinds of hearsay statements which may unconstitutionally prejudice a defendant: those which name or identify a defendant and those which circumstantially *link* a defendant to the crime. That *Douglas* viewed both types of hearsay as problematic is again reflected later in the opinion:

> "Loyd's alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the

> circumstances surrounding the shooting, this formed a crucial link in the proof both of petitioner's act and of the requisite intent to murder." 380 U.S. at 419.

Having identified two types of hearsay—directly accusatory and circumstantial, or linkage—*Douglas* then related both to what Judge Gibbons of the Third Circuit termed a harm-focused theory of the Confrontation Clause.[3] While not all hearsay testimony would violate the Sixth Amendment, that which is substantially harmful—that is, fundamental to the prosecutor's case and thus particularly prejudicial to the defendant—will trigger the Confrontation Clause:

> "This case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse. *The alleged statements clearly bore on a fundamental part of the State's case against petitioner.* The circumstances are therefore such that 'inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant'." 380 U.SL at 420 [Quoting *Namet* v. *United States*, 373 U.S. 179, 187; 10 L.Ed.2d 278; 83 S.Ct. 1151 (1963)]. (Emphasis added).

But although *Bruton* and *Douglas* acknowedged that the admission of statements which directly accuse may violate the Sixth Amendment, those cases did not hold that *only* such statements will receive scrutiny under the Confrontation Clause. The proper inquiry is broader: Does the statement bear on a fundamental part of the prosecutor's case, and thereby add critical weight to his case in a form not subject to cross-examination? If it does,

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[3] *United States* v. *Belle*, 593 F.2d 487, 503 (3rd Cir. 1979) (dissenting opinion of Gibbons, J.).

then it is "powerfully incriminating." Clearly, linkage testimony may meet this test as much as directly accusatory testimony, especially in cases built upon circumstantial evidence. As Judge Contie, writing for the Sixth Circuit, observed in the present case, the narrow approach urged by the Petitioner "ignores the true incriminating effect of the statement." *Marsh* v. *Richardson*, *supra*, at 1212.

Indeed, the inflexible *per se* rule suggested by Petitioner ignores the reality of how juries decide cases. Jurors, who are carefully instructed not to deliberate, discuss or form conclusions about the case until they have heard *all* the evidence, ultimately view each piece of evidence and testimony in the context of the entire case. Even if inadmissible testimony is not damaging to the defense on its face, if it derives a *strong* inculpatory inference (i.e., one which adds "substantial, perhaps critical weight to the government's case") when linked with the other evidence, then the defendant is faced with the same dilemma as George Bruton: "[T]he *risk* that the jury will not, or cannot, follow instructions is so great, *and the consequences of failure so vital to the defendant*, that the practical and human limitations of the jury system cannot be ignored." *Bruton* v. *United States*, *supra*, 391 U.S. at 135. (Emphasis added).

The foregoing language from *Bruton* reflects the harm-focused analysis of *Douglas* v. *Alabama*, *supra*. If the evidence is substantially harmful to the defense, then the Confrontation Clause is implicated, regardless of whether the evidence is characterized as direct or linkage.

Further, given the harm-focused rationale for bringing "evidentiary linkage" or "contextual implication" within the purview of the Confrontation Clause, it is irrelevant whether the source of the linkage—that is, the admissible

evidence which gives inculpatory flavor to the accomplice's statements—is in prosecution or defense testimony. If anything, linkage through defense evidence results in an even more serious constitutional violation since it infringes upon a defendant's due process right to present a defense and offer testimony. *In re Oliver*, 333 U.S. 257, 273; 92 L.Ed.682; 68 S.Ct. 499 (1947); *Pointer* v. *Texas*, *supra*, 380 U.S. at 405.

In the present case, for example, Williams' statement as redacted had Kareem Martin in an automobile, discussing his premeditated plan to kill the intended robbery victims. The hearsay drew an additional inculpatory meaning in the context of Respondent Marsh's own testimony that she was present in the car with Williams and Martin, and thus arguably in a position to have knowledge of the plan. However, Respondent's testimony was not incriminating by itself—she did not hear the alleged conversation or see Martin produce a gun. Serious constitutional questions therefore arise under the Petitioner's restrictive application of *Bruton:* To avoid a devastating inference from intrinsically unreliable evidence which cannot be cross-examined, must a defendant give up the due process right to present a defense and answer the State's case? Is it consistent with the concept of a fair trial to force a defendant to trade one funadmental constitutional right for another, when both rights work together to protect the reliability of the verdict?

If, as this Court has repeatedly held, *Bruton* "illustrates the extent of the Court's concern that the admission of this type of evidence will distort the truthfinding process," *Lee* v. *Illinois*, *supra*, 90 L.Ed.2d at 527, then the Sixth Circuit's opinion in the present case is in no way a radical departure from or unwarranted expansion of *Bru-*

ton; on the contrary, it is a logical and necessary corallary of that case.

3. Reliability.

This Court has never held that all hearsay must be subject to cross-examination to satisfy the Confrontation Clause. However, in the context of the basic truth-finding function of the Sixth Amendment, the Court has consistently required some extrinsic indicium of reliability as a substitute for cross-examination. In *Ohio* v. *Roberts*, 448 U.S. 56, 65; 65 L.Ed.2d 597; 100 S.Ct. 2531 (1980), the Court stated:

> "Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is not material departure from the reason of the general rule.' *Snyder* v. *Massachusetts*, 291 U.S., at 107, 78 L.Ed. 674, 54 S.Ct. 330, 90 A.L.R. 575."

Bruton v. *United States*, *supra*, took special note of the inherent unreliability of an accomplice's statements, and thus the necessity of confrontation, given "the recognized motivation to shift blame onto others." *Id.*, 391 U.S. at 136.

Likewise, in *Lee* v. *Illinois*, *supra*, 90 L.Ed.2d at 526, Justice Brennan, writing for the majority, remarked:

> "Our cases recognize that this truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination."
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> * * *
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> "Over the years since Douglas, the Court has spo-

> ken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants."[4]

Lee suggested that there may be circumstances which would impart a guarantee of trustworthiness to a codefendant's confession, but was careful to note that the burden is on the prosecutor "to overcome the weighty presumption against the admission of such uncross-examined evidence." *Id.*, 90 L.Ed.2d at 529-530. See also, *New Mexico* v. *Earnest*, ___ U.S. ___; ___ L.Ed.2d ___; ___ S.Ct. ___; 39 Cr. L. 3253 (1986) (concurring opinion of Justice Rehnquist).[5]

Thus, as with the other two *Bruton* factors—denial of cross-examination and the powerfully incriminating character of the evidence—the inclusion of lack of reliability as a decisional basis of that case is a direct function of the Sixth Amendment's concern for ensuring the reliability of the verdict.

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[4] Significantly, *Lee* refers to confessions that *incriminate* defendants, not confessions that *name* defendants. This reflects the Court's concern in *Douglas* that substantially harmful inferences may have their genesis in both directly accusatory and linkage testimony.

[5] In *Lee*, the codefendant's confession was actually considered as substantive evidence by the judge in a bench trial. Therefore, it was not strictkly speaking a *Bruton*-type case because it was not concerned "with the effectiveness of limiting instructions in preventing spill-over prejudice to a defendant when his codefendant's confession is admitted against the codefendant at a joint trial." *Id.*, 90 L.Ed.2d at 527.

In the present case, however, the prosecutor at trial conceded that Williams' statement was inadmissible against Respondent Marsh, tacitly, if not explicitly acknowledging its inherent unreliability. From the time of trial onward, the issue in this case has been squarely framed as involving the applicability of *Bruton* v. *United States* to these facts.

To summarize, the *Bruton* rule is a practical rule designed to protect the integrity of the truth-finding process. If a codefendant's extrajudicial statement is admitted into evidence against the codefendant, and if that statement meets each of the three criteria set forth in the case—it is not subject to cross-examination, it is powerfully incriminating and it is unreliable—then the Confrontation Clause does not permit the greatly elevated risk that the jury will disregard cautionary instructions and improperly use the evidence in convicting the defendant. In such a case, it is as though no instruction were given, and the situation becomes akin to *Douglas* v. *Alabama, supra,* where the challenged evidence was admitted directly against the defendant. If the three *Bruton* factors are present, both the risk of jury misuse and the harm to the defendant are equally great regardless of whether the codefendant's statement is inculpatory on its face or becomes inculpatory when linked with other evidence.

C. Post-*Bruton* Developments.

Following the *Bruton* decision, two other factors emerged as significant in this type of issue: the harmless error rule and the effect of interlocking confessions.

1. The Harmless Error Rule.

In *Harrington* v. *California,* 395 U.S. 250; 23 L.Ed.2d 894; 89 S.Ct. 1726 (1969), this Court held that Sixth Amendment violations under *Bruton* v. *United States, supra,* are subject to the harmless error test of *Chapman* v. *California,* 386 U.S. 18; 17 L.Ed.2d 705; 87 S.Ct. 824 (1967). Making its own assessment of the probable impact of the codefendant's statements on the minds of an average jury, the Court concluded that not only were those

admissions cumulative to the other evidence, "[b]ut apart from them the case against Harrington was so overwhelming that this violation of Bruton was harmless beyond a reasonable doubt." 395 U.S. at 254.[6]

The Court had occasion to apply the *Chapman-Harrington* harmless error test in two subsequent cases involving *Bruton* violations. In *Schneble* v. *Florida*, 405 U.S. 427, 432; 31 L.Ed.2d 340; 92 S.Ct. 1056 (1972), the Court held that "unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required." Observing that the independent evidence of guilt was overwhelming, *Schneble* found the *Bruton* error harmless.

Likewise in *Brown* v. *United States*, 411 U.S. 223; 36 L.Ed.2d 208; 93 S.Ct. 1565 (1973), the Court held the *Bruton* error harmless where "[t]he testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury." *Id.*, 411 U.S. at 231.

2. Interlocking Confessions.

In *Parker* v. *Randolph*, *supra*, the Court considered the application of *Bruton* to a situation where the defendant's own confession was admitted into evidence along with his codefendant's confession. Writing for four members of the Court, Justice Rehnquist stated that where a defendant's confession "interlocks" with the extrajudicial

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[6] However, *Harrington* did suggest that the mere fact that an extrajudicial statement is not facially inculpatory of a defendant does not automatically render admission of the statement harmless error. For the circumstances of the case and the details of the confession may make it "as clear as pointing and shouting that the person referred to was" the defendant. *Id.*, 395 U.S. at 253.

statement of his accomplice, *Bruton* does not apply, and "the admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution." *Id.*, 442 U.S. at 75.

The plurality's view that *Bruton* was inapplicable was based on the absence of two of the three *Bruton* factors discussed previously. First, in light of the defendant's own confession, the codefendant's statement was not "powerfully incriminating," that is, it did not add substantial weight to the prosecutor's case:[7]

> "Thus, the incriminating statements of a codefendant will seldom, if ever, be of the 'devastating' character referred to in Bruton when the incriminated defendant had admitted his own guilt. The right protected by Bruton—the 'constitutional right of cross-examination,' id., at 137, 20 L Ed 2d 476, 88 S Ct 1620—has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence." 422 U.S. at 73.

Secondly, the inherent unreliability of an accomplice's statement is a less significant factor when the statement parallels the defendant's confession:

> "Nor does the natural 'motivation to shift blame onto others,' recognized by the Bruton Court to render the incriminating statements of codefendants 'inevitably suspect' . . . require application of the

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[7] The plurality reasoned that a codefendant's facially incriminatory confession becomes less incriminatory *in the context of extrinsic evidence*, i.e., the defendant's own confession. This is evidentiary linkage in reverse, and is conceptually equivalent to the approach followed by the Sixth Circuit in this case, where the statement becomes *more* incriminating in the context of other evidence.

> Bruton rule when the incriminated defendant has corroborated his codefendant's statements by heaping blame onto himself."

However, Justice Rehnquist drew a careful distinction between a defendant like Randolph, who confesses his own guilt, and one "who has, insofar as the jury is concerned, maintained his innocence from the beginning." *Id.*. 442 U.S. at 72. In the latter case, he left no doubt that the strictures of *Bruton* would apply undiluted:

> "When, as in Bruton, the confessing codefendant has chosen not to take the stand *and the implicated defendant has made no extrajudicial admission of guilt*, limiting instructions cannot be accepted as adequate to safeguard the defendant's rights under the Confrontation Clause." 442 U.S. at 74 (emphasis added).

Justice Blackmun, concurring in the judgment in *Parker* v. *Randolph*, eschewed an approach which viewed interlocking confessions cases as if no *Bruton* violation occurred at all, opting instead for the traditional harmless error analysis under *Chapman* v. *California*, *supra*, and *Harrington* v. *California*, *supra*. Justice Blackmun expressed a concern that the two confessions might interlock in part only, or that one might go much farther than the other in implicating the defendant. Although he believed that error in most interlocking confessions cases would be harmless, he concluded that merely because the codefendant's "confessions may interlock to some degree does not ensure, as a *per se* matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative." 442 U.S. at 79.

The *Parker* dissent agreed that the preferable approach to interlocking confessions cases involves application of the harmless error standard.

In *Lee* v. *Illinois*, *supra*, 90 L.Ed.2d at 529, the Court cited Justice Blackmun's concurring opinion in *Parker* v. *Randolph* in holding that "confession is not necessarily rendered reliable simply because some of the facts it contains 'interlock' with the facts in the defendant's statement." *Lee* involved the admission of a nontestifying accomplice's confession as substantive evidence against the defendant at a bench trial. The key to the resulting Sixth Amendment error in *Lee* was that although the two defendants' confessions overlapped factually to a great extent, they diverged on crucial trial issues:

> "The subjects upon which these two confessions do not 'interlock' cannot in any way be characterized as irrelevant or trivial. The discrepancies between the two go to the very issues in dispute at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie." *Id.*

Lee v. *Illinois* casts doubt on the vitality of the plurality opinion in *Parker* v. *Randolph*. At the very least, two confessions would have to interlock on all but trivial or irrelevant facts in order for the Court to say that no *Bruton* violation occurred at all. Where a defendant has made no extrajudicial admission of guilt, or where a defendant's confession differs from his codefendant's on significant issues, *Bruton* applies, subject to the harmless error test.

D. Application Of *Bruton* To Respondent's Trial.

Regardless of whether Williams' statement incriminated Respondent on its face or when linked to other evidence, the application of the factors discussed above demonstrates that its admission at their joint trial violated Respondent's right of confrontation under *Bruton* v. *United States*, *supra*, because:

1. Respondent had no opportunity to cross-examine Williams;

2. Williams' statement, both standing alone and in the context of other evidence, added substantial weight to the prosecutor's case against the Respondent;

3. Williams' statement was extremely unreliable;

4. The Respondent consistently maintained her innocence, and there was no interlocking confession; and

5. The admission of Williams' statement was not harmless beyond a reasonable doubt.

Since Williams asserted his Fifth Amendment right not to testify, there is no question that he was not available for cross-examination. The other four factors will be discussed individually.

1. Williams' Statement Was Powerfully Incriminating.

The prosecutor's theory at trial was that the defendants planned to rob Ollie Scott and that the shootings were within the scope of the robbery. It was also the prosecutor's theory that the Respondent was an aider and abettor. To convict her as such under Michigan law, he was required to prove that she "aided and abetted in the prepa ration of the crime knowing that (her) coparticipants had the necessary specific intent." *People* v. *Sharp*, 57 Mich. App. 624, 626; 226 N.W.2d 590 (1975). See also, *People* v. *Poplar*, 20 Mich. App. 132, 136; 173 N.W.2d 732 (1969) (". . . [T]he criminal intent of the aider and abettor is presumed from his actions *with knowledge of the [principal's] wrongful purpose.*") (Emphasis added).

Therefore, both for the assault with intent to murder charge and the two felony murder charges, proof of Respondent's knowledge of and participation in a precon-

ceived plan to rob and kill the victims was extremely important to the prosecution.

Williams' statement, as redacted, refers to Kareem Martin's plan to "take out," or kill the victims after the robbery. This was the *only* direct evidence of a preformulated plan to kill. The very existence of an articulated plan was strong evidence in that it tended to negate the otherwise plausible theory that the shootings were a premeditated act first conceived by Martin *after* the robbery and *after* Respondent had left the premises.

Williams' description of the plan therefore makes his redacted statement strongly incriminatory *on its face*, even without reference to other testimony. Thus, even under Petitioner's interpretation, there was *Bruton* error.

But of course the statement drew an even stronger inculpatory inference in the context of Respondent's testimony that she was in the car with Martin and Williams as they drove to Ollie Scott's house. The inference is that she was in a position to hear the plan, and therefore any assistance she offered during the robbery was done with the knowledge that the victims were to be killed.

That inference was absolutely crucial to the Respondent's successful prosecutions as an aider and abettor.[8] The prosecutor explained it to the jury this way:

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[8] Williams was also tried on an aiding and abetting theory, and the prosecutor explicitly argued to the jury that his statement showed knowledge:

> "You will recall that he knew, in his statement that he made, in his confession—that he knew even before he went over to the home on Mendota that there was going to be a killing. Kareem said that he would have to take them out after the robbery. This is what he knew before he went to the home." (J.A. 311-312).

> "The People's theory is that the entire robbery was planned by the two Defendants and Kareem Martin prior to going over to Mrs. Scott's house." (J.A. 321-322).

The prosecutor further argued that "Clarissa Marsh was in the planning stages of the robbery" (J.A. 339).

In short, if the Respondent had no knowledge of Martin's plan to kill she would not be guilty of the charged offenses, because without that knowledge, she could not have shared in his intent to kill. Significantly, she was not even present when the killings took place.

Like *Douglas* v. *Alabama*, *supra*, 380 U.S. at 420, Williams' statement "bore on a fundamental part of the State's case." Also like *Douglas*, the statement was "the only direct evidence" of a fact crucial to the prosecution. *Id.*, at 419. Like *Bruton* v. *United States*, *supra*, 391 U.S. at 127-128, the evidence of Martin's plan, as described in Williams' statement, "added substantial, perhaps critical weight to the Government's case in a form not subject to cross-examination."

Therefore, both standing alone and linked with the Respondent's own exculpatory testimony, Williams' statement was "powerfully incriminating" as to the Respondent, as that term is properly understood in the context of *Bruton*.

2. Williams' Statement Was Unreliable.

There is absolutely nothing about William's statement, or the circumstances under which it was made, which would overcome the strong presumption that as an accomplice's confession, it is inherently unreliable. In fact, the very reason for the presumption of unreliability—"the

recognized motivation to shift the blame onto others"—is apparent from the text of the statement.[9]

While Williams admitted participating in the robbery, his confession was a transparent attempt to exculpate himself from the murder charges by shifting blame onto his codefendants. According to the confession, it was Kareem Martin, not he, who conceived of the plan to "take out" the victims; it was Martin and Clarissa Marsha, not he, who planned the robbery and explained his part to him; it was Martin, not he, who took the victims to the basement. And, said Williams, when Martin later asked him why he didn't come down to the basement, Williams protested that he "wasn't doing no shit like that."

The unreliability of Williams' statement is further shown by the fact that it is at odds not only with Respondent's testimony, but also with that of complaining witness Cynthia Knighton, who testified that Williams was in the basement with a gun when the shootings occurred.

In addition, the prosecutor himself argued in closing that portions of Williams' statement were an attempt to deflect blame for the killings onto someone else:

> "You may ask yourselves about the confession that the Defendant made where he confessed to the robbery and tried to take himself out of any participation in the shooting. I submit that it's understandable to make a statement, as Mr. Williams did to the police, especially under the circumstances . . . So it's clear when you look at his statement and he tries to take himself out of it that it's not enough for a reasonable doubt." (J.A. 316).

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[9] In assessing reliability, it would be appropriate to examine the unedited statement, at least in terms of the declarant's motivation.

Here, the prosecutor apparently recognized what this Court observed in *Lee* v. *Illinois*, *supra*, 90 L.Ed.2d at 529: "The true danger inherent in this type of hearsay is, in fact, its selective reliability." Williams' statement is a classic unreliable accomplice's confession, and as such falls squarely within the ambit of *Bruton* v. *United States*.

3. No Interlocking Confessions.

The fact that the Respondent herself testified does not bring this case within the "interlocking confession" rule of *Parker* v. *Randolph*, *supra*, for two reasons. First, the Respondent made no extrajudicial admission of guilt, and her in-court testimony was completely exculpatory. As far as the jury was concerned, she maintained her innocence from the beginning. *Id.*, 442 U.S. at 72. Thus, the practical value of cross-examination was not diminished, as it would be with a "defendant whose own admission of guilt stands before the jury unchallenged." *Id.*, at 73.

Secondly, the Respondent's testimony did nothing to corroborate the portion of Williams' confession which was central to the prosecutor's case: that there was a preformulated and articulated plan to rob and kill. In other words, Respondent's testimony does not impart any reliability to her codefendant's statement. *Lee* v. *Illinois*, *supra*.

In short, neither the inherent unreliability of Williams' statement nor the devastating harm flowing from it was mitigated by the Respondent's testimony, and therefore there is no reason to depart from the rule of *Bruton* v. *United States*.[10]

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[10] The Sixth Circuit recognized the inapplicability of *Parker* v. *Randolph* to this case: "Although Marsh described her participation in the scheme in this case, she admitted no guilt, and her testimony and Williams' statement do not 'interlock' regarding the crucial facts relative to intent." *Marsh* v. *Richardson*, *supra*, at 1207, fn. 5.

4. The Error Was Not Harmless.

Having determined that Respondent's right of confrontation was violated, the remaining question is whether the error was harmless beyond a reasonable doubt under the facts of this case. *Chapman* v. *California, supra; Harrington* v. *California, supra.* There are three compelling reasons why the erroneous admission of Williams' statement at the joint trial cannot be considered harmless.

First, apart from the statement, the other evidence on the issue of intent and knowledge was circumstantial, ambiguous, and far from the overwhelming type of independent evidence which rendered the *Bruton* error harmless in cases such as *Harrington, Schneble* and *Brown.*[11] The prosecutor's chief witness was Cynthia Knighton, who testified to the following facts.

1. Before any trouble began, she saw Clarissa Marsh and a man (Kareem Martin) in the house talking to her aunt, Ollie Scott (J.A. 28-30)[12]

2. Respondent said that she came to "pick something up" (J.A. 33).

3. At some point during the conversation, Martin pulled a gun, and said that Ollie Scott knew something about someone being killed; Respondent also said that

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[11] Throughout her appeal, Respondent argued that the evidence was insufficient as a matter of law under *Jackson* v. *Virginia*, 443 U.S. 307; 61 L.Ed.2d 560; 99 S.Ct. 2781 (1979). The Sixth Circuit expressly declined to address this issue in light of its conclusion that the convictions were obtained in violation of the Sixth Amendment. *Marsh* v. *Richardson, supra*, at 1201, fn. 1.

[12] Obviously, Knighton was not in a position to testify about anything which occurred before the defendants arrived at Scott's house.

Scott knew something about a killing (J.A. 34-35). These were the last words she heard spoken by Clarissa Marsh.

4. After Martin pulled the gun, Respondent walked to the front door (J.A. 37).

5. At some point, the doorbell rang; Respondent opened the door, and Williams entered (J.A. 39-41).

6. Martin took Ms. Scott upstairs, and Williams went into the next room (J.A. 46-47). Respondent remained by the door (J.A. 47). Ms. Knighton and her son ran towards the door where Respondent was standing (J.A. 47).

7. Respondent "grabbed" Ms. Knighton when she ran for the door, but didn't say anything. Williams came in from the adjacent room and told her and her son to sit back down on the floor (J.A. 47-48).

8. Williams told Knighton and her son to go into the basement (J.A. 59). Once Knighton left the living room, she never saw the Respondent again, and she did know whether Respondent was even in the house when everyone else went into the basement (R. 229-239.)[13]

The prosecutor argued that Respondent's behavior in the house was circumstantial evidence that she was acting according to a plan (J.A. 329). But even if this evidence was probative of a preplanned *robbery*, it gave little or no support to the inference that Respondent knew and intended that murdering the victims was part of the plan.[14]

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[13] Knighton's testimony on this point tends to corroborate Respondent's own testimony that she left the house when everyone else went into the basement (J.A. 187).

[14] Every court which has written to the sufficiency of evidence on intent in this case has conceded that the prosecutor's case was not overwhelming. The Michigan Court of Appeals called it "a close

In *Harrington* v. *California*, this Court based its decision in part on the fact that "the case against Harrington was not woven from circumstantial evidence." 395 U.S. at 254. The same cannot be said in Respondent's case.

The second reason for not finding the error harmless is that in contrast to the otherwise weak, circumstantial case against the Respondent, Williams' statement was the only *direct* evidence that killing the victims was an explicit part of the plan. If the jurors believed that Respondent was party to an express, preformulated plan to kill, they would be impelled to believe that she had both knowledge of Kareem Martin's intent to kill and the express malice which would support the murder charges. Without direct proof of the plan which Williams' statement provided, the prosecutor was limited to circumstantial proof of "implied malice," which in the context of this case would mean that Respondent acted in reckless disregard of a known and high degree of risk that death or serious bodily harm might occur.[15]

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question." The Federal District Court noted, "The undisputed evidence at trial showed that Martin fired all of the shots. Although the shootings occured in the basement, no evidence was adduced that Petitioner went into the basement. Moreover, the prosecution presented no evidence that Petitioner had the specific intent to kill." Michigan Supreme Court Justice Charles L. Levin, dissenting from the order denying leave to appeal, referred to "the paucity of evidence of her involvement in a concert of action to rob and kill." While the Sixth Circuit did not address the sufficiency issue, it did refer to "the paucity of other evidence of intent."

[15] Under Michigan law as applied at Respondent's trial, malice is an essential element of all murder, including felony murder. *People* v. *Aaron*, 409 Mich. 672; 299 N.W.2d 304 (1980); *People* v. *Fountain*, 71 Mich. App. 491; 248 N.W.2d 589 (1976). Malice may be either express (the specific intent to kill or to inflict great bodily injury), or implied (to act in reckless disregard of a known and high degree of risk that

The point is not that there was or was not legally sufficient evidence of implied malice,[16] but that it would be much easier for a jury to rely on direct evidence of express malice rather than try to extract the more ethereal inference of implied malice from ambiguous circumstantial evidence. Based on the impelling direct inference created by Williams' confession, its probable impact on the minds of an average jury, *Harrington* v. *California*, *supra*, 395 U.S. at 254, was devastating.

The third reason for not finding the error harmless lies in the way the prosecutor used Williams' statement in closing argument. He set the stage for the jury's misuse of the statement with his theory that the crimes were planned by Martin, Williams and Respondent (J.A. 321-322). He further emphasized Respondent's individual involvement in the planning stages (J.A. 311-312).

Then, speaking to Williams' culpability, the prosecutor referred to Martin's plan to kill the victims, and argued that this was direct evidence of Williams' knowledge and intent as an aider and abettor (J.A. 311-312).

When the prosecutor argued that both defendants were involved in the planning, and then relied on Williams' confession as the only direct evidence of that theory as applied to Williams, his entreaty that the jury not use Williams' statement against Respondent was surely lost in the heat and noise of the explosive innuendo he created.

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death or great bodily injury might occur.) *Id.*; *People* v. *Morrin*, 31 Mich. App. 301; 187 N.W.2d 434 (1971). See *Marsh* v. *Richardson*, *supra*, at 1212, fn. 10.

[16] In *United States* v. *Lane*, 474 U.S. ____; 88 L.Ed.2d 814; 106 S.Ct. ____ (1986), both majority and dissent were agreed "that the harmless error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry." 88 L.Ed.2d at 826, fn. 13.

The situation reflects the rationale of *Bruton:* despite cautionary instructions, the effect of the inadmissible confession on the minds of the jurors, bolstered by the prosecutor's argument, was indelible.

But what is worse, the prosecutor used Williams' statement *directly* against the Respondent when he suggested that her own testimony was unreliable:

> "Because she was part of the plan. It's important in light of her testimony when she says Kareem drives over to Benjamin Williams' home and picks him up to go over. What's the thing that she says? 'Well, I'm sitting in the back seat of the car'. 'Did you hear any conversation that was going on in the front seat between Kareem and Mr. Williams?' 'No, couldn't hear any conversation. The radio was too loud'. I asked you whether that is reasonable. Why did she say that? Why did she say she couldn't hear any conversation? She said, 'I know they were having a conversation but I couldn't hear it because of the radio'. Because if she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that." (J.A. 326-327).

Thus, the prosecutor not only attempted to impugn the Respondent's credibility, but he argued by negative inference that she in fact heard Martin and Williams discuss the plan to rob and kill the victims. Yet, the very existence of that discussion was based on inherently unreliable evidence which Respondent had no opportunity to cross-examine.[17]

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[17] Respondent is not arguing this issue on a theory of prosecutorial misconduct, nor is it necessary to do so in this case. See *Lee* v. *Illinois*, *supra*, 90 L.Ed.2d at 524, fn. 3. It is irrelevant whether the prosecutor acted in good faith or not when he argued the impermissible linkage to the jury.

Under the facts of this case, it is not only possible but likely that the jury improperly used Williams' confession in determining Respondent's guilt. Far from being insignificant or cumulative, the confession rendered the State's case against the Respondent significantly more persuasive. The Sixth Amendment error in this case was not harmless, but devastating.

And the ultimate harm to the Respondent—and indeed, to society—is the precise harm that the Confrontation Clause was designed to avoid: the verdict is simply not reliable.[18] Absent Williams' confession, the jury might well have found Clarissa Marsh guilty only of a lesser offense, or might have acquitted her altogether. As it stands, the integrity of this verdict and of the process by which it was reached is open to serious doubt. Our Constitution cannot tolerate such a result.

E. Effect On The Administration Of Justice.

Both Petitioner and the United States, as amicus curiae, have argued that to include linkage evidence within the scope of *Bruton* v. *United States* would impose too great a cost on the efficient administration of justice. On the contrary, the cost is quite minimal, especially when balanced against the importance of the Sixth Amendment right of confrontation.

A similar argument was advanced in the *Bruton* case itself, where the Court responded that while "[j]oint trials

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[18] In *Delaware* v. *Van Arsdall*, 475 U.S. ____; 89 L.Ed.2d 674, 684-685; 106 S.Ct. ____ (1986), the Court stated:

> "The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial . . ." (Citations omitted).

do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial," *Id.*, 391 U.S. at 134, "[w]e secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high." *Id.*, 391 U.S. at 135, *quoting People* v. *Fisher*, 249 N.Y. 419, 432; 164 N.E. 336, 341 (Lehman, J., dissenting).

When a right—constitutional or otherwise—affects the very integrity of the trial process, this Court has always been willing to tolerate even substantial inconvenience as an acceptable cost of vindicating that right. For example, in *United States* v. *Mechanik*, ___ U.S. ___; 89 L.Ed.2d 50; 106 S.Ct. ___ (1986), the Court discussed the considerable social costs of reversing a criminal conviction. Writing for the majority, Justice Rehnquist left no doubt that society must absorb those costs when the reliability of the verdict is at stake:

> "These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence." *Id.*, 89 L.Ed.2d at 57.

The great danger of subordinating fundamental constitutional rights to the obsessive quest for efficiency is exemplified in the brief of the United States as *amicus curiae* in this case, where the Solicitor General makes the rather incredible argument that (1) the Sixth Circuit's rule would result in more separate trials for codefendants and (2) such severances are undesirable because they "increase the opportunities for inconsistent verdicts among similarly situated defendants." Brief for the

United States, p. 23.[19] If a defendant's chances of acquittal are greater at a trial where the jury does not hear the inadmissible and unreliable confession of a codefendant, then *a fortiori* the likelihood is great that the jury at a joint trial will misuse the confession in determining the defendant's guilt, despite instructions to the contrary. *Quod Erat Demonstrandum*. The Solicitor General might prefer consistent verdicts to reliable verdicts; the Constitution does not.

Furthermore, applying *Bruton* to circumstantial evidence as well as to direct accusations is unlikely to entail the draconian consequences Petitioner suggests.

For example, Petitioner fears that a doctrine of evidentiary linkage or contextual implication will require the judge to conduct a "trial before the trial," and examine both prosecutorial and defense evidence in order to make an intelligent decision on severance. This argument conveniently ignores the duty placed on the prosecutor himself to ensure a fair trial.[20] The prosecutor is not required to try defendants jointly. Thus, if an inculpatory inference may arise when a redacted confession is linked with other government evidence, the prosecutor will be aware of this before trial, and should be under a duty to seek an alter-

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[19] Of course, in a *Bruton* situation, the defendants are not "similarly situated," since one is denied the right of confrontation.

[20] In *Berger* v. *United States*, 295 U.S. 78, 88; 79 L.Ed.1314; 55 S.Ct. 629 (1935), the Court stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

native to a joint trial. In such a case, he would not have to reveal his entire case to the judge.

Furthermore, even if linkage occurs through defense testimony, the prosecutor will generally be on notice if there is a high risk of contamination from codefendant's confession. The present case is a perfect example. Before trial, the prosecutor knew that he was proceeding against both defendants on an aiding and abetting theory and on a theory that both were involved in planning the robbery. He knew the importance of Williams' statement as the only direct evidence of that plan and he knew that Williams' statement placed Respondent in the car when the alleged plan was discussed. He knew that he was going to use that statement against Williams. And although he could not know the precise content of the Respondent's testimony, he knew that she had pled not guilty and would thus challenge his theory that she was an aider and abettor.[21]

Hence, where the prosecutor had strong direct evidence against Williams and weaker circumstantial evidence against Respondent, but tried both on the same basic theory, he was surely on notice of the great potential for spillover from Williams' confession.[22]

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[21] Since Respondent had no prior criminal record, the prosecutor could have reasonably surmised that she would probably testify in her own behalf.

[22] The defense in this case did everything it could be expected to do to prevent the confrontation problem. Before trial, Respondent moved for severance based on a theory of inconsistent defenses which would pit one defendant against the other, as well as on the inculpatory nature of Williams' statement under *Bruton* (J.A. 260-261; 266). He moved to suppress Williams' statement at trial, and renewed the motion for severance after observing that even the redacted statement contained inculpatory inferences (J.A. 100).

When a prosecutor, in spite of this breadth of knowledge before trial, elects to proceed with a joint trial which results in the denial of a defendant's right of confrontation, then he must proceed at his risk.

Petitioner also fails to recognize that there are alternatives to severance.[23] For example, the court could empanel two juries. This has become a common practice in the Recorder's Court for the City of Detroit, where Respondent was tried. Or there would be situations where the extrinsic evidence against the confessing codefendant is so strong that the prosecutor could simply choose not to use the confession against either defendant.[24]

But even when the prosecutor chooses to risk a joint trial, he receives additional protection from the harmless error doctrine. If the disputed confession is merely cumulative to extrinsic evidence which is itself overwhelming, and as a result the confession has little impact on the jury, the defendant's conviction will remain undisturbed on appeal, despite the technical existence of *Bruton* error.

Petitioner also argues that the rule of evidentiary linkage would eliminate the possibility of redaction in all

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[23] As the Court stated in *Bruton*, "Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice." 391 U.S. at 134.

[24] In the present case, there was independent testimony that Williams held a gun on the victims while Martin shot them. Thus, the circumstantial evidence against Williams was much stronger than that against Respondent. In this sense, the direct evidence of a plan contained in Williams' confession had a greater impact on Respondent's case than on Williams', and Williams would probably have been convicted even without his confession.

cases. This argument overlooks the fact that under the rule applied by the Sixth Circuit, only linkage testimony which engenders a *substantially harmful* circumstantial inference will result in a *Bruton* violation. As discussed previously, the prosecutor will generally be in a position to assess the effect of the evidence in relation to the rest of his case.

The more serious problem arises from the Petitioner's *per se* rule of facial incrimination, which would make redaction a panacea, a result of clearly not intended by *Bruton*.[25]

The Solicitor General argues that the evidentiary linkage rule would be subject to mid-trial manipulation by the defendant, who "would be able to make the codefendant's confession appear to be potentially damaging." Brief of United States as Amicus Curiae, p. 21. This suggestion defies common sense. A defendant who has any chance of acquittal is not going to alter his testimony so as to create a powerfully incriminating inference. On the other hand, the defendant against whom the prosecutor has a very strong case will not benefit from tailoring his testimony to the confession, since any error would be harmless under *Harrington* v. *California*, *supra*.

In short, a rule which looks at the incriminatory effect of a nontestifying codefendant's statement in the context of other, admissible evidence will not have a drastic effect on the efficient administration of justice, either state or

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[25] Even the Fifth Circuit, which has expressed a preference for a rule which does not look beyond the face of the codefendant's statement, *United States* v. *Stewart*, 579 F.2d 356, 359 (5th Cir. 1978), subsequently warned, in *Clark* v. *Maggio*, 737 F.2d 471, 476 (1984): "The redaction technique must, however, be employed cautiously to avoid violating the spirit, if not the letter, of *Bruton*."

federal. Indeed, the Federal Circuits which have accepted such a rule—the Second, the Sixth, the Seventh, and the D.C. Circuits—appear to have had little problem in its application.

At the same time, the Sixth Amendment values which are at stake when a defendant's hearsay statement circumstantially adds critical weight to the prosecutor's case are so paramount that any marginal inconvenience created by the evidentiary linkage rule must be accepted as the price of fair trials and reliable verdicts.

F. Williams' Confession Was Not Admissible As Substantive Evidence Against Respondent.

For the first time in the more than seven-year history of this case, the prosecution is arguing that Williams' confession was admissible as substantive evidence against the Respondent, and therefore the Confrontation Clause was not violated. Petitioner cites *Lee* v. *Illinois*, *supra*, in support of this novel proposition.

Petitioner never raised this issue in the Michigan courts. This case has consistently been framed by all parties as involving the application of *Bruton*, which presupposes that the challenged evidence is inadmissible against the defendant, and focuses on the efficacy of cautionary instructions.

Therefore, Petitioner is foreclosed from raising the issue at this late date. In *Cardinale* v. *Louisiana*, 394 U.S. 437, 438; 22 L.Ed.2d 398; 89 S.Ct. 1162 (1969), this Court stated:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

See also, *Michigan* v. *Tyler*, 436 U.S. 499, 512, fn. 7; 56 L.Ed.2d 486; 98 S.Ct. 1942 (1978).

Neither the Michigan courts, the Federal District Court nor the Sixth Circuit has addressed this issue, and it is not properly before this Court.

In addition, the issue as framed by the Petitioner is clearly without merit. As discussed previously, Williams' statement to the police was plainly an attempt to minimize his culpability for the murders by shifting blame onto hs codefendants, and as such, bore all of the classic indications of inherent unreliability recognized in *Douglas*, *Burton* and *Lee*.[26]

There was nothing about the statement or the circumstances under which it was made to impart the substantial indicia of reliability which *Lee* v. *Illinois*, *supra*, would require to exempt it from the necessity of cross-examination. Neither the Respondent's testimony nor Cynthia Knighton's testimony corroborates the crucial portions of Williams' confession relating to knowledge and intent.

Petitioner is correct in his observation that certain hearsay evidence which bears strong indicia of reliability may be used as substantive evidence without offending the Sixth Amendment. But in the present case, there is no basis for relaxing the requirement of confrontation and cross-examination. Under *Lee* v. *Illinois*, *supra*, the strong presumption of unreliability which inheres in Williams' confession stands unrebutted and unrebuttable. The extrajudicial confession was not admissible as substantive evidence.

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[26] See Section D(2), *supra*, for a more complete discussion of why Williams' confession is intrinsically unreliable.

G. Summary.

This issue must be decided in the context of the general purposes of the Sixth Amendment. If any evidence—direct or circumstantial—adds significant weight to the prosecutor's case and at the same time lacks reliablity or trustworthiness, then the lack of opportunity to cross-examine that evidence violates the Confrontation Clause.

In a *Bruton* situation, where a codefendant's confession incriminates a defendant when linked with admissible evidence, the proper analysis is to test the strength, not the source of the inference. If, in the context of the other evidence, the confession adds substantial weight to the prosecutor's case in a form not subject to cross-examination, then *Bruton* applies, subject to a harmless error analysis.

It may be that many confessions which incriminate only indirectly will turn out to be harmless. But a *per se* rule which woodenly refused to look beyond the face of the statement poses too great a threat to the Sixth Amendment and to the reliability of the verdicts in more marginal cases which are woven from circumstantial evidence. Such is the situation in Clarissa Marsh's case. Her constitutional guarantee of a fair trial and an accurately determined judgment can be vindicated only through application of the rule followed by the Sixth Circuit in this case.

CONCLUSION AND RELIEF

WHEREFORE, for all of the foregoing reasons, Respondent asks this Honorable Court to affirm the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE
R. STEVEN WHALEN
(*Appointed by this Court*)
Special Assistant Defender
1200 Sixth Avenue
Third Floor, North Tower
Detroit, Michigan 48226
(313) 256-2814
Counsel for Respondent Marsh